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A PLEA FOR THE ESTABLISHMENT OF THE FEDERAL JUDICIARY PLAN IN OUR STATES.

WHEN we observe with what great respect the Federal Bench is regarded by the American Bar, with what profound awe it is looked upon by the criminal and with what silent disrespect and lurking fear it is envisaged by the chronic agitator and the I. W. W. type, may we not well pause—lawyer, layman and all—and ask ourselves from what pure root, from what undefiled well does such a font of justice flow?

When we turn from our Federal Bench to the Bench of England, we find the judicial ermine as pure and unsullied to-day as it has been for decades, nay, centuries. The decisions of the English Courts have begotten a confidence the world over that bears a testimonial of the highest order to the character and ability of the English Judge. And pray, from what source does such a stream of justice arise?

Returning again to our native shores, let us consider the judiciary of that State which has given us a Choate, a Gray and a Holmes. What lawyer has not turned from the reports of the other States to the pages of a Pickering, a Cushing or a Metcalf, with relief, and there found a clear concise statement of the law and the reason thereof? And again we seek the origin of such learning and such fairness.

The discovery of this root, this well of perennial justice holds no deep mystery for even the casual explorer. An independent judiciary, made so by appointment for life during good behaviour, at a salary which cannot be diminished during their term of office, is the fountainhead of justice in those systems we have examined.

And here the fact should be emphasized that it is the individual, the citizen, not the lawyer, who is most concerned in estab-

lishing and maintaining an able, upright, just judiciary. "It is most current for it comes home to men's business and bosoms." In the words of the immortal John Marshall, himself the ideal judge: [1]

> "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent with nothing to control him but God and his conscience? I have always thought from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary."

The judge is the final arbiter of the rights of the people. He stands alone between them and the autocratic power of a king or a controlling majority. It matters little whether the Constitution under which the people live be written or unwritten; it is of no avail as a social compact and a shield of freedom if there be no judiciary to construe it and to stand between the consent of the governed as expressed in their Constitution and the will of those holding power for the day as expressed in royal edicts and prerogatives or statutes of a legislature or unwarranted acts of officials.

In a Monarchy, such as England, with an unwritten Constitution, which has been spoken of as that "subtle organism which has proceeded from progressive history", a strong, able, just judiciary is necessary to protect the people from the power of the throne, from the dominating will of victorious and powerful ministers, from the illegal acts of the different departments of government, and lastly, in the quarrels which arise daily among themselves. Under the English Constitution, however, an Act of Parliament is supreme, and while it may be unconstitutional, the courts are powerless to declare it so.

On the other hand, under the written Constitution of the United States, the courts not only decide upon the rights of the citizens as between themselves, pass upon the acts of the different departments of government and of the executive, but

[1] DEBATES, VA. CONV. 619.

even scrutinize the final word of the law-making power, a statute passed by Congress and approved by the President, and if it appear to them that this statute is contrary or repugnant to the law of the land, the Constitution, they declare it unconstitutional, and their judgment so far nullifies the action of the two other departments of government as to have the same effect as if no statute had been passed at all.

In which political organization is the stronger judiciary needed? Clearly, it is in that one where the judiciary is more powerful (the judiciary is the weakest department of any government at best) and where it is more subject to attack from the other departments of government, and this must be in that political system where it can declare the acts of the legislature and executive null and void. We may be sure that a jealous executive or legislature would lose no opportunity to wreak its vengeance upon a court which had refused to bow to its will and had annulled its acts before the very eyes of the people. To withstand such an attack, the judiciary must be independent of those jealous departments and also, for the moment, independent of the people themselves, that is, of the controlling majority in power, for the executive and the legislature would be but representatives of that controlling majority and would immediately appeal to it as against the "usurping" judiciary.

The political organization of our States is modeled upon that of the United States under a written Constitution, and each has an executive, a legislative and a judicial department; the three Estates, each supposed to be independent of the others and with a division and separation of powers.

We have now seen how an independent judiciary is to be obtained; we have seen that it is established in England, in Massachusetts and in the Federal Courts of the United States. We have seen, further, that the need of such independence is more important in the United States than in England and that the State governments of the United States are modeled upon the Federal Government as established by the Federal Constitution.

It must follow, therefore, that this independence of the ju-

diciary should be most carefully preserved in our States, but when we examine the present judicial systems of the different States we find to our amazement that the teachings of political history and the philosophy of government have been totally disregarded, and that where an independent judiciary is most required we are confronted with a system of elective judges and of appointive judges, all for short terms at small salaries: a system that not only is at variance with the ideas and examples given above, but that tends to destroy all independence rather than strengthen it.

A short review of the history of the different judicial systems shows beyond a doubt that in order to obtain real justice we must have an independent judiciary, and in order to have an independent judiciary we must have judges who are appointed to hold office during good behaviour at a competent salary which cannot be diminished during their term of office.

The earliest precedent for the establishment of an independent judiciary seems to be the statute of Alphonso V of Aragon, in 1442, providing that the judges should continue in office during life, removable only on sufficient cause by the King and Cortes united.

We have only to refer to the rebuke of Coke by James I in 1615 and the still more famous trial of Hampden in 1636 by Charles I to see how venal and dependent the judiciary of England were at that time. Their tenure of office was dependent upon the crown, and because of this dependency Hampden was compelled to pay his twenty shillings of ship-money and one of the torches of the Revolution was lighted. And forget not the words of Edmund Burke: "Would twenty shillings have ruined Mr. Hampden's fortune? No! but the payment of half twenty shillings, on the principle it was demanded, would have made him a slave."

The just and liberty-loving people of England remembered these lessons and took them to heart, and in the Act of Settlement with William,[2] it was provided that the commissions of the judges should be made, not, as formerly, *durante bene placito,* but *quamdiu se bene gesserit,* and that it should be law-

[2] 13 Will. III c. 2.

ful to remove them only upon the address of both Houses of Parliament.

And afterwards, by the statute I Geo. III c. 23, we find that the judges were continued in office during good behaviour, notwithstanding any demise of the crown (which had been held to vacate their seats). The commentators have all said that this statue was passed upon the earnest recommendation of the King himself, but Hallam in his Constitutional History of England denies this and says that Parliament was responsible for the initiation of that statute, and from what we know of George III and from that provision of our Declaration of Independence which reads: "He (George III) has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries", it would seem that Hallam is probably right.

By 6 Geo. IV c. 84, the salaries of the English judges were secured to them absolutely during the continuance of their commissions, and this was the last step in completing their independence.

We learn that Sweden, after having experimented during the Diets which preceded the Revolution of 1772 with judges elected by the popular assemblies in power, only to find "that persons acquitted by one tribunal were convicted by another", adopted the English system as one of its constitutional reforms.

The Dutch Constitution of 1814 embodied the same principle.

The French Constitutions of 1791 and 1795 and the constitutional Charter of Louis XVIII all preserved the independence of the judiciary by establishing their terms of office for life during good behaviour. And even as early as 1467, Louis XI had made the memorable declaration "that the judges ought not to be deposed or deprived of their offices but for a forfeiture previously adjudged and judicially declared by a competent tribunal". We have only to refer to Edmund Burke's "French Revolution" to see what a great and invaluable part this independence of the French judiciary played in the estab-

lishment of liberty and the destruction of tyrannous and corrupt monarchies in that country.

Even in Germany, that erstwhile efficient land of officialdom, from whom Prussia and the then reigning Hohenzollerns had crushed out in a treadmill of militarism the last drops of individual liberty, liberty as we Anglo-Saxons know it and have learned to revere it, the independence of the judiciary was sought to be preserved by appointment of the judges for life and they could only be removed for certain reasons and under certain proceedings prescribed by law.

We are all familiar with the Federal judicial system as established in the Constitution of the United States. Article III provides:

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a Compensation, which shall not be diminished during their continuance in Office."

Under Article II, Section 2, the President nominates and "by and with the Advice and Consent of the Senate", appoints the

> "Judges of the Supreme Court and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Although the question of whether or not the Federal District and Circuit Judges are "inferior Officers" within the meaning of this Section has never been judicially determined, yet it is fortunate that this question has been administratively determined in the negative for over a century and the President has appointed those Judges and the Supreme Court Judges in the same manner.

Suffice it to quote these provisions of the Constitution and to say that they are the embodiment of all the strongest measures evolved throughout the ages in other political systems and finally crystallized in the English Constitution and the Constitutions of our States, as they existed at the time of the Revolution, to insure to the judiciary the greatest possible independence.

At the time of the adoption of the Federal Constitution, no one of the States chose its judges by popular election, and in most of the States the judges held office during good behaviour. As we have previously noticed, the States have gradually deserted the principles of the English and Federal judicial systems and to-day in all but about ten States the judges are elected by popular vote and the usual term of office is six years—truly, a sad commentary on our progressive political actions.

Massachusetts and New Hampshire are the only States which have remained constant and steadfast to the system of appointive judges with a life tenure. The Bills of Rights of these two States contain to-day, in this particular among others, the same unalterable statements of political principle that were placed therein by the "Fathers" a century and a quarter ago, the two bearing an almost literal resemblance to each other. The Massachusetts one reads as follows:

> "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws."

When we consider these Statements of Right, we do not wonder that political ebullitions, factions and office-holders of the day were powerless to subvert such principles into dema-

gogic expedients; and rather, we indulge in vain regrets that the "Fathers" of the Constitutions of our States did not have the prescience to establish these principles for us for all time by reserving them in our Bills of Rights, for it is incomparably easier for the "politician" to amend or abolish any other provision of a Constitution than one contained in the Bill of Rights.

In only two other States, Delaware and Maine, are all the judges still appointed; while in four additional ones, the judges of the Supreme Court are appointed and the lower judges elected. And finally, in six States, including Virginia, the judges of the higher courts are elected by the joint vote of the two Houses of the Legislature.

In Louisiana, my native State, the Judges of the Supreme Court are elected for a term of twelve years; those of the Courts of Appeal for eight years. The District Judges of the City of New Orleans are elected for a term of twelve years, while those in other parts of the State serve only four years.

We see, therefore, that in over thirty States the judges of the Supreme judicial tribunals at stated intervals, the average period being six years, must descend from the calm, impartial and independent atmosphere of the Bench into the seething cauldron of the political hustings; a transformation during which the character of even the most free and upright judge must undergo some change. We observe, further, that in all but four States the lower judges must submit their candidacy to the Bench to a popular vote and must buffet the storms of political factions and partisans at frequent elections before they sit in judgment on the private and political fortunes of their late political opponents and adherents.

Can we say that it is within "the lot of humanity" to provide a set of judges who could pass the judgment of a Daniel on friend and foe alike with a heated, and perhaps a vituperative, campaign still casting its shadow over the court-room? Such cannot be! Judges are human like all of us. We must take man as he is and not as he should be, and mould our government accordingly. We must guard the judge against tempta-

tions and so draw our Constitutions as to make him "as free, impartial and independent, as the lot of humanity will admit".

In the light of political experience it is hard to see how a thinking man can still maintain the idea that an elective short-term judiciary system produces better judges and surer justice than the appointive life-term system. The ideal of government in this respect should be to obtain the best judge; one learned in the law, just, free, independent, respected by the community and whose character entitles him to such respect. Surely, all thinking persons and students of government will agree to this. When, however, the benefits of the Federal system are stressed, the answer to-day invariably is that it is undemocratic to appoint and most undemocratic to invest the judge with a life tenure.

These objections form the gravamen of the complaints against that system. The mode of selection of the judges rouses the ire of the people, or better of the politicians and demagogues, rather than the results obtained from that mode. We must stand corrected then; the ideal is not, cannot be, to obtain the services of the best judge. It is to provide the best mode of selection of judges. To state the proposition would seem to be sufficient to refute it. The objections, however, can easily be answered.

It is not a conclusive answer to point to the Federal Government and to say that a system provided by the "Fathers", embodied in the Constitution and used for over a century must be a democratic system, a system compatible with a republican form of government and hence suitable to our States? And was not this same system established in all of our original States at the time of the Revolution? Whatever we may say as to the progress of science or the progress of sociology, we can hardly say that we have reached to-day a higher ideal of democracy than was known to and insisted upon by Jefferson, or a higher ideal of what a republic and its government should be than was held and expressed by Hamilton.

The Commonwealth of Massachusetts is an answer and an example sufficient in itself.

These objections have been answered for all time in the cogent reasoning and stately language of the Seventy-Eighth Federalist. They have been answered in that powerful, never-to-be-forgotten address of Rufus Choate before the Massachusetts Constitutional Convention of 1853.

Let Rufus Choate point out in his own words the dangers of the elective system and the safeguards of the appointive one; for his words are as true to-day in fact and in their application to the principles of our government as they were when first uttered nearly seventy years ago.

> "It is a question, certainly of some nicety, to determine what offices the public good prescribes should be filled by a direct election of the people; and what should be filled by the appointment of others, as the governor and council, chosen by the people. On the best reflection I have been able to give it, this seems to me a safe general proposition. If the nature of the office be such, the qualifications which it demands, and the stage on which they are to be displayed be such, that the people can judge of those qualifications as well as their agents; and if, still farther, the nature of the office be such that the tremendous ordeal of a severely contested popular election will not in any degree do it injury; will not deter learned men, if the office needs learning, from aspiring to it; will not tend to make the successful candidate a respecter of persons, if the office requires that he should not be; will not tend to weaken the confidence and trust, and affectionate admiration of the community towards him, if the office requires that such be the sentiments with which he should be regarded: then the people should choose by direct election. If, on the other hand, from the kind of qualifications demanded, and the place where their display is to be made, an agent of the people, chosen by them for that purpose, can judge of the qualifications better than they can; or if from its nature it demands learning, and the terrors of a party canvass drive learning from the field; or if it demands impartiality and general confidence, and the successful candidate of a party is less likely to possess either,—then the indirect appointment by the people, that is, appointment by their agent, is wisest. * * * *
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> "In the first place, the qualities which fit him (i. e. the judge) for the office are quite peculiar; less palpable, less salient,

so to speak, less easily and accurately appreciated by cursory and general notice. They are an uncommon, recondite, and difficult learning, and they are a certain power and turn of mind and cast of character, which, until they come actually, and for a considerable length of time, and in many varieties of circumstances, to be displayed upon the bench itself, may be almost unremarked but by near and professional observers. What the public chiefly see is the effective advocate; him their first thought would be perhaps to make their candidate for judge; yet experience has proved that the best advocate is not necessarily the best judge,—that the two functions exact diverse qualifications, and that brilliant success in one holds out no certain promise of success in the other. * * * *

"But this is by no means the principal objection to making this kind of office elective. Consider, beyond all this, how the office itself is to be affected; its dignity; its just weight; the kind of men who will fill it; their learning; their firmness; their hold on the general confidence. How will these be affected? Who will make the judge? At present he is appointed by a governor, his council concurring, in whom a majority of the whole people have expressed their trust by electing him, and to whom the minority have no objection but his politics; acting under a direct personal responsibility to public opinion; possessing the best conceivable means to ascertain, if he does not know, by inquiry at the right sources, who does and who does not possess the character of mind and qualities demanded. By such a governor he is appointed; and then afterward he is perfectly independent of him. And how well the appointing power in all hands has done its work, let our judicial annals tell. But, under an elective system, who will make the judge? The young lawyer leaders in the caucus of the prevailing party will make him. Will they not? Each party is to nominate for the office, if the people are to vote for it, is it not? You know it must be so. How will they nominate? In the great State caucus, of course, as they nominate for governor. On whom will the judicial nominations be devolved? On the professional members of the caucus, of course. Who will they be? Young, ambitious lawyers, very able, possibly, and very deserving; but not selected by a majority of the whole people, nor by a majority, perhaps, of their own towns, to do anything so important and responsible as to

make a judge,—these will nominate him. The party, unless the case is very scandalous indeed, will sustain its regular nominations; and thus practically a handful of caucus leaders, under this system, will appoint the judges of Massachusetts. This is bad enough; because we ought to know who it is that elevates men to an office so important—we ought to have some control over the nominating power—and of these caucus leaders we know nothing; and because, also, they will have motives to nominate altogether irrespective of the fitness of the nominee for the place, on which no governor of this Commonwealth, of any party, has ever acted. This is bad enough. But it is not all, nor the worst. Trace it onwards. So nominated, the candidate is put through a violent election; abused by the press, abused on the stump, charged ten thousand times over with being very little of a lawyer, and a good deal of a knave or boor; and after being tossed on this kind of blanket for some uneasy months, is chosen by a majority of ten votes out of a hundred thousand, and comes into court, breathless, terrified, with perspiration in drops on his brow, wondering how he ever got there, to take his seat on the bench. And in the very first cause he tries, he sees on one side the counsel who procured his nomination in caucus, and has defended him by pen and tongue before the people, and on the other, the most prominent of his assailants; one who has been denying his talents, denying his learning, denying his integrity, denying him every judicial quality and every quality that may define a good man, before half the counties in the State. Is not this about as infallible a recipe as you could wish to make a judge a respecter of persons? Will it not inevitably load him with the suspicion of partiality, whether he deserves it or not? Is it happily calculated altogether to fix on him the love, trust, and affectionate admiration of the general community with which you agree he ought to be clothed, as with a robe, or he fills his great office in vain? Who does not shrink from such temptation to be partial? Who does not shrink from the suspicion of being thought so? What studious and learned man, of a true self-respect, fitted the most preeminently for the magistracy by these very qualities and tastes, would subject himself to an ordeal so coarse, and so inappropriate, for the chance of getting to a position where no human purity or ability could assure him a trial by his merits?"

And then let Alexander Hamilton, speaking in the Federalist, answer the charge against a life-tenure: [3]

"It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as *permanency in office,* this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the *citadel* of the public justice and the public security. * * * *

"Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

"There is yet a further and a weightier reason for the permanency of judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the

[3] No. LXXVIII.

> society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject."

These objections have been answered also by a Marshall, a Story, a Kent and a Miller, all of whom have set forth the extreme value of the Federal system and have deplored the onrushing elective short-term system.

In the face of such profound learning, of such expressions of political experience from these illustrious and high-minded students and founders of democratic government, it would be but a vain show of reason and learning to seek to explore the paths of controversy through which they have previously passed. They have brushed aside by their logic every thorn by the wayside; they have stamped out with their reason every obstruction which stood in the way; and the road is now established and left clear for us to follow where they have blazed the trail.

"I have gathered a posie of other men's flowers, and nothing but the thread that binds them is my own", but if this article has helped to preserve and to call to attention some few neglected or forgotten facts, examples and opinions of the necessity and the mode of establishing an independent judiciary in our States, I think I may feel satisfied that it has served some useful purpose. "Eternal vigilance is the price of liberty."

Jas. Hy. Bruns.

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